

IN THE IOWA SUPREME COURT

NO. 15-2143

WILMA KELLOGG,

Plaintiff-Appellant,

vs.

CITY OF ALBIA, IOWA

Defendant-Appellee.

**APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR MONROE COUNTY
HONORABLE RANDY S. DEGEEST, JUDGE**

**PLAINTIFF-APPELLANT'S RESISTANCE TO APPLICATION FOR
FURTHER REVIEW FROM THE DECISION OF THE IOWA COURT OF
APPEALS DATED FEBRUARY 8, 2017**

Jeff Carter
Jeff Carter Law Offices, P.C.
300 Walnut Street, Suite 260
Des Moines, Iowa 50309
Tel: (515) 557-1961
Fax: (515) 557-1962
jeff@jeffcarterlaw.com

Zachary C. Priebe
Jeff Carter Law Offices, P.C.
300 Walnut Street, Suite 260
Des Moines, Iowa 50309
Tel: (515) 557-1961
Fax: (515) 557-1962
zpriebe@jeffcarterlaw.com

ATTORNEYS FOR PLAINTIFF-APPELLANT

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RESISTANCE TO APPLICATION FOR FURTHER REVIEW

In considering an application for further review, the Iowa Supreme Court has the discretion to review all or part of the issues raised on appeal or in the application for further review. *In re Marriage of Becker*, 756 N.W.2d 822, 824 (Iowa 2008). None of the stated grounds for further review exist in City of Albia's application for further review. Iowa R. App. P. 6.1103(1). Further review is unwarranted in this case as the Iowa Court of Appeals correctly reversed the granting of summary judgment at the district court level as it pertains to Wilma Kellogg's nuisance claim and remanded the case to the Monroe County District Court for trial.

STATEMENT OF THE ISSUES

- I. NO GROUNDS EXIST TO WARRANT FURTHER REVIEW AS THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE CITY OF ALBIA IS NOT IMMUNE FROM A NUISANCE CLAIM UNDER IOWA CODE §670.4(h).**

Authorities

Iowa Code § 670.2
Iowa Code § 670.4
Iowa R. App. P. 6.1103(1)
Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998)
Frontier Leasing Corp., v. Links Eng'g, L.L.C., 781 N.W.2d 772 (Iowa 2010).
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Thoeming v. City of Davenport, NO. 15-1113, 2016 WL 3275239, 885 N.W.2d 220 (Iowa Ct. App. 2016)
58 Am. Jur. 2d Nuisances § 9 (1989)

II. THE COURT OF APPEALS CORRECTLY REVERSED THE DISTRICT COURT RULING WITH RESPECT TO THE STATUTE OF LIMITATIONS SINCE MS. KELLOGG ADVANCED A THEORY OF INTERMITTENT DAMAGE TO HER PROPERTY

Authorities

Iowa Code §670.5
Iowa R. App. P. 6.1103(1)
Hegg v. Hawkeye Tri-County REC, 512 N.W.2d 558 (Iowa 1994)
Kellogg v. City of Albia, No. 15-2143, 2017 WL 512483 (Iowa Ct. App. Feb. 8, 2017)

ROUTING STATEMENT

The City of Albia's application for further review should be denied as no grounds for further review exist under Iowa Rules of Appellate Procedure. Iowa R. App. P. 6.1103(1).

STATEMENT OF THE CASE

Course of Proceeding and Disposition Below: On February 8, 2017, the Iowa Court of Appeals affirmed in part, reversed in part, and remanded the Monroe County District Court's ruling granting the City of Albia's motion for summary judgment. On February 28, 2017, the City of Albia filed an application for further review. Ms. Kellogg now files her resistance to application for further review.

STATEMENT OF THE FACTS

Plaintiff/Appellant Wilma Kellogg relies upon the background facts and proceeding provided by the Iowa Court of Appeals in its ruling dated February 8, 2017 in her resistance.

ARGUMENT

I. NO GROUNDS EXIST TO WARRANT FURTHER REVIEW AS THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE CITY OF ALBIA IS NOT IMMUNE FROM A NUISANCE CLAIM UNDER IOWA CODE §670.4(h).

The City of Albia contends that the Iowa Court of Appeals has created an exception for nuisance claims under Iowa Code §670.4(h). This argument is pretext for what the City is actually asking from the Iowa Supreme Court. In this application for further review the City requests that the Iowa Supreme Court effectively legislate from the bench.

Iowa Code §670.2 subjects municipalities in Iowa to liability for their torts. Iowa Code §670.2. Municipal liability, however, is not without limit. Iowa Code §670.4. Iowa Code §670.4(h) bars any “claim based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a public improvement as defined in section 384.37, subsection 19, or other public facility that was constructed or reconstructed in accordance with a generally recognized engineering or safety

standard, criteria, or design theory in existence at the time of the construction or reconstruction.” Iowa Code §670.4(h).

In assessing the immunity question under Iowa Code §670.4(h) in this case it is vital that we are able to distinguish between the concepts of negligence and nuisance. The Iowa Supreme Court has discussed the difference between nuisance and negligence:

Negligence is a type of liability-forming conduct, for example, a failure to act reasonably to prevent harm. In contrast, nuisance is a liability-producing condition. Negligence *may or may not* accompany a nuisance; negligence, however, is not an essential element of nuisance. If the condition constituting the nuisance exists, the person responsible for it is liable for resulting damages to others even though the person acted reasonably to prevent or minimize the deleterious effect of the nuisance.

Martins v. Interstate Power Co., 652 N.W.2d 657, 660 (Iowa 2002) quoting *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 315 (Iowa 1998) (emphasis added).

Building on this point, the Martins court added that the “tort concepts of negligence and nuisance ‘describe completely distinct concepts, which constitute distinct torts, different in their nature and their consequences....’ *Id.* at 660-61 quoting 58 Am. Jur. 2d Nuisances § 9, at 676 (1989).

In this case, the Court of Appeals distinguished the *Thoeming* case from Ms. Kellogg’s in overturning the District Court’s summary judgment ruling. To distinguish nuisance and negligence, we recognize that “to constitute a nuisance,

‘there must be a degree of danger (likely to result in damage) *inherent* in the thing itself,’ “beyond the degree of danger “arising from mere failure to exercise ordinary care.” *Thoeming v. City of Davenport*, NO. 15-1113, 2016 WL 3275239, 885 N.W.2d 220 (Iowa Ct. App. 2016).

Here, the Court of Appeals found that “Kellogg has offered evidence of intermittent flooding on her property on at least eight or nine occasions in a seven-year period preceding filing her lawsuit.” *Kellogg v. City of Albia*, No. 15-2143, 2017 WL 512483, at *5 (Iowa Ct. App. Feb. 8, 2017). As a result Ms. Kellogg “has experienced reoccurring flooding near electrical appliances, standing water, and resulting mold.” *Id.* It is these inherent dangers, along with the dangers intrinsic to all flooding that distinguish Ms. Kellogg’s case from *Thoeming*.

Thus, Ms. Kellogg submits that no grounds exist for further review since her nuisance claim does not arise out of negligent design, nor does it have anything to do with generally recognized engineering standards. Instead her claim against the City of Albia arises based on the flooding events on her property, and the resulting dangerous condition inherent in the flooding.

A summary judgment record is to be reviewed in the light most favorable to the opposing party, who is afforded every legitimate inference that the record will bear. *Frontier Leasing Corp., v. Links Eng’g, L.L.C.*, 781 N.W.2d 772, 775 (Iowa

2010). With that in mind, the Iowa Court of Appeals correctly decided that the City of Albia was not entitled to summary judgment at the district court.

II. THE COURT OF APPEALS CORRECTLY REVERSED THE DISTRICT COURT RULING WITH RESPECT TO THE STATUTE OF LIMITATIONS SINCE MS. KELLOGG ADVANCED A THEORY OF INTERMITTENT DAMAGE TO HER PROPERTY

In reversing the District Court's summary judgment ruling with respect to the statute of limitations the Court of Appeals correctly relied upon existing Iowa case law. In that case, "where the wrongful act is continuous or repeated, so that separate and successive actions for damages arise, the statute of limitations runs as to these latter actions at the date of their accrual, not from the date of the first wrong in the series." *Hegg v. Hawkeye Tri-County REC*, 512 N.W.2d 558, 559 (Iowa 1994). A person pursuing a claim against a municipality under Iowa Code §670 has two years in which to pursue that claim. Iowa Code §670.5.

In this case, the Court of Appeals found that as a matter of law Ms. Kellogg is not "precluded from recovery of damages for actions accruing within two years prior to the February 25, 2015 petition." *Kellogg v. City of Albia*, No. 15-2143, 2017 WL 512483, at *6 (Iowa Ct. App. Feb. 8, 2017).

As Ms. Kellogg's flooding events are continuous in nature the District Court improvidently granted summary judgment to the City. Under Iowa law Ms.

Kellogg can proceed with her nuisance claim based on the intermittent nature of the flooding events on her property.

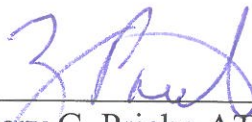
CONCLUSION

Ms. Kellogg respectfully requests that this Court deny the City of Albia's application for further review.

Respectfully Submitted,

/S/Jeff Carter

Jeff Carter, AT0001487

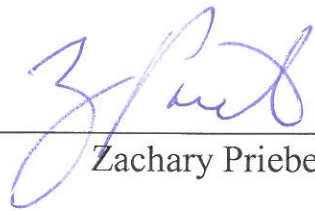


Zachary C. Priebe AT0010113
JEFF CARTER LAW OFFICES, P.C.
300 Walnut Street, Suite 260
Des Moines, IA 50309
Tel: (515) 557-1961
Fax: (515) 557-1962
jeff@jeffcarterlaw.com
zpriebe@jeffcarterlaw.com
ATTORNEYS FOR PLAINTIFF-
APPELLANT

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 1403 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

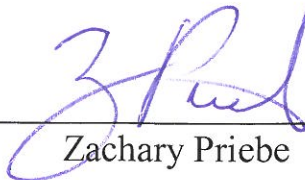
This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14.



Zachary Priebe

CERTIFICATE OF FILING

I, Zachary Priebe, hereby certify that I, or a person acting on my direction, did file the attached Appellant's Resistance to Application for Further Review via the Electronic Document Management System with the Clerk of the Iowa Supreme Court on this 10th day of March, 2017.



Zachary Priebe